Supreme Court, U.S.
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No. 99-185

IN THE

Supreme Court of the United States

JOHN P. MEINHARDT, for himself and all others similarly situated, *et al.*,

Petitioners,

v.

UNISYS CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Should *de novo* appellate review apply to all mixed questions of law and fact in ERISA cases, notwithstanding this Court's precedent holding that the circuit courts may vary the scope of review applied to such mixed questions depending on whether the issues on appeal are fact-driven or based on legal conclusions, in recognition of the district court's exclusive role as fact-finder and to avoid imposing unnecessary burdens on the circuit courts?

II. Does the district court's exclusion of a proffered expert witness proven to be lying during the *voir dire* process present a compelling question for this Court's review?

PARTIES TO THE PROCEEDING

Petitioners are John Meinhardt, Michael Heck, Joseph McCarthy, Angelo DiPietro, Gary Vala, Carolyn Gohlike, Dennis C. Stanga, James M. Collins, John H. Burgess, Jr., Bernard McDevitt, Parker Kean, Nadia F. Sos, Farouk M. Sos, Kenneth Goers, John J. Cieslicki, William Torkildson, Henry Zylla, Richard Silver, Ronald Grippo, Edward Lawler, Richard Andujar, Clarence Muller, Charles Wahler, James McLaughlin, Donald Rader, Joseph Lau, James Gangale, Alfred Contarino, Richard Colby, John Marcucci, Joseph Fiore, Richard Mastrodomenico, Nick Klemenz and Peter Szczybek. The individuals represent a certified class of participants in the defined contribution pension plans of Unisys Corporation.

Respondents are Unisys Corporation, the Administrative Committee of the Unisys Savings Plan, the Investment Committee of the Unisys Savings Plan, Jack A. Blaine, John J. Laughlin, Kenneth L. Miller, David A. White, Stefan Riesenfeld, Michael R. Losey, Curtis A. Hessler, Edwin P. Gilbert, Thomas Penhale, Richard H. Bierly, Leon J. Level, and George T. Robson.

RULE 29.6 STATEMENT

Respondent Unisys Corporation has no parent or publicly held company owning ten percent or more of its stock.

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3 Edward J. Devitt, *et al.*, *Federal Jury Practice and Instructions*, § 73.04 (4th ed. 1987) 24

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STATEMENT OF THE CASE

Petitioners are a certified class of present and former participants in the Unisys Savings Plan, the Unisys Retirement Investment Plan, and the Unisys Retirement Investment Plan II (together the "Plan" or "Unisys Plan"). Following a ten-day bench trial, the district court found that Unisys Corporation's ("Unisys") purchase of guaranteed investment contracts ("GICs") from Executive Life Insurance Company of California, for inclusion in the Unisys Plan, was not a fiduciary breach under ERISA. That ruling was affirmed by the Third Circuit following an "independent" review of the trial record.[1] Unisys will not here re-state the district court's voluminous findings of fact and conclusions of law, all of which were supported by ample, if not overwhelming, record evidence.[2] Nevertheless, certain of the district court's factual findings are essential to an understanding of the flaws in petitioners' arguments.

1. *See* Petitioners' Appendix ("Pet. App.") at 6 ("[*W*]*e have reviewed the trial record independently* and conclude that in all material respects, the District Court's findings of fact were not clearly erroneous. . . .") (emphasis added).

2. Of course, petitioners cannot substitute their own account of the trial below and, in so doing, blithely ignore the district court's findings. *Cf. Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court of correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) ("The [*certiorari*] jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."). As more fully explained below, each of the district court's findings are supported by ample record evidence and, as such, the fact that the district court adopted Unisys' proposed findings of fact is of no consequence, as this Court has previously held. *See infra* at 17.

The Unisys Plan is a defined contribution employee savings plan under ERISA section 3(34), 29 U.S.C. § 1002(34). Participation in the Plan was entirely voluntary and "employees are not promised any particular level of benefits; instead, they are promised only that they will receive the balances in their individual accounts." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 637 n.1 (1990). In other words, the employee-investors, participants in defined contribution plans, not the fiduciaries, bear the risk of loss.[3] In a six-month period, beginning in June 1987 and through January 1988, Unisys purchased, through a competitive bidding process, three five-year "guaranteed investment contracts" from Executive Life as additional investments for two of the Plan's funds.[4] These purchases are the subject of the instant petition. Petitioners challenge the steps employed in selecting these Executive Life GICs, but, once again, fail to apprise this Court of the district court findings detailing the care with which these investment decisions were made. They also ignore the district court's specific findings, left standing by the Court of Appeals, that petitioners offered no credible evidence of damages.[5]

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3. *E.g.*, Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. Chi. L. Rev. 1105, 1112 (1988) (in a defined contribution plan, "the employee bears the burden of disappointing investment results").

4. A guaranteed investment contract or "GIC" is a contract, issued by an insurance company, "under which the issuer is obligated to repay the principal deposit at a designated future date and to pay interest at a specified rate over the duration of the contract." *In re Unisys Savings Plan Litig.*, 74 F.3d 420, 426 (3d Cir. 1996). *See also* Petitioners' Appendix ("Pet. App.") at 75.

5. Petitioners' wholesale failure to account for the facts found by the district court in their Statement of the Case makes all of their factual assertions improper. *See* Sup. Ct. R. 15.2.

At the time of the purchases, Executive Life enjoyed the highest ratings, AAA and A+, from two nationally-recognized insurance ratings services, Standard & Poor's and A.M. Best, respectively. *See* Pet. App. at 79. The undisputed testimony at trial revealed that Standard & Poor's was the only available source of credible information on the creditworthiness of insurance companies at the time (*id.* at 88), and the ratings service examined the industry risk; earnings performance; capitalization; liquidity; management; asset mix; diversification; interest rate risk management and liquidity risk, all before issuing a rating to Executive Life. *Id.* at 83-84. Standard & Poor's also interviewed Executive Life's management to gain further insights into the prospects for the insurer. *Id.* at 84.

Unisys made three purchases of Executive Life GICs which are the subject of this lawsuit. The first GIC purchase, in June of 1987, was done under the auspices of Murray Becker, a GIC consultant, who had handled more than 500 competitive bids of this type. As the district court specifically found, after listening to Mr. Becker's testimony and assessing his credibility:

> Mr. Becker has a degree from the Wharton School of the University of Pennsylvania, was an enrolled actuary, and spent the entirety of his career in the insurance industry (or acting as a GIC specialist). I find that Mr. Becker was qualified to serve as an expert consultant to Unisys on the bid selection process on June 9, 1987.

Id. at 82. Mr. Becker testified that, and as specifically found by the district court, absent the Standard & Poor's rating,

there was no adequate method to determine GIC issuers of the highest caliber.[6] Moreover, and again based on undisputed testimony, the district court found that "fiduciaries had no credible basis to challenge the AAA rating of Standard & Poor's." *See* Pet. App. at 88.

After that June, 1987 bid, Unisys no longer employed Mr. Becker and made the investment decisions using internal expertise. Petitioners overlook the district court's specific findings, again based on undisputed evidence, regarding the careful and detailed steps taken prior to the investment decisions, aside from reliance on the Standard & Poor's and A.M. Best ratings.[7] More specifically, and ignored by the petitioners, the district court found that the Unisys investment managers, prior to purchasing the Executive Life GICs: examined the maturity dates of the investments in the Plan's portfolio to insure a proper "laddering" of the investments

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6. On that point, the district court quoted Mr. Becker's testimony with approval. *See* Pet. App. at 83 ("But in the absence of the rating service, there was really no satisfactory way to make the determination. So when Standard and Poor's went into the business of rating insurance companies for their claims paying ability, it filled a void.").

7. With the GIC selection process brought in-house, additional responsibility fell to Leon Level and David White, Unisys employees whose expertise was specifically found to be well-suited for the task:

> Both Mr. Level and Mr. White testified to their experience in finance and investing, and I find that both had the education, experience and expertise needed to make these investment decisions.

See Pet. App. at 80.

(to minimize interest rate risk); broadened the bid list to insure the maximum amount of market information available to the fiduciaries; structured the Plan's portfolio to balance the investments in Executive Life against other issuers in the portfolio (with their heavier concentrations in real estate and mortgages); met with the executives of bidders and representatives of those companies selected for the Plan's portfolio; and examined the issuers' SEC forms 10K and 10Q. *See* Pet. App. at 86, 88-90. Unisys also consulted with the investment advisors to its defined benefit pension plan before making investments for the Savings Plan. *Id.* at 90. While petitioners contend that the Executive Life investments were ill-suited for inclusion in the Savings Plan, they fail to mention the district court's specific finding, again based on undisputed testimony, that all insurers at that time had high yield bonds in their investment portfolios, *id.* at 84, and that the prevailing view was then, and remains, that "a diversified portfolio of high yield bonds promised a relatively high rate of return, with relatively low risk of default." *Id.* at 87.[8]

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8. Of course, "ERISA does not require that a pension plan take no risks with its investments." *Marshall v. Glass/Metal Assocs.*, 507 F. Supp. 378, 384 (D. Haw. 1980). Equally important to the lower courts' rulings were a number of issues upon which petitioners offered no proof at all. While petitioners decry the fact that Executive Life's investment portfolio included high yield bonds, they offered no proof tending to show the percentage level at which the purchase of issuers with such assets in their portfolios is imprudent. *See* Pet. App. at 84 ("[T]he inclusions of such bonds in the Executive Life Portfolio did not make the selection of the GIC imprudent. In that regard, I note the evidence at trial that all insurance companies had high yield bonds in their investment portfolios."). Moreover, petitioners offered no proof in support of their claim that Unisys failed to diversify the Plan by selecting the Executive Life GICs (*id.* at 141), and their damages expert specifically admitted that he

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The district court additionally found that Unisys analyzed Executive Life's investment strategy and asset mix (again to measure the suitability of the investment for inclusion in the Plan):

> Mr. White further explained that the decision to purchase the Executive Life contracts followed consideration of Executive Life's "barbell" investment strategy (using other investments, including a high percentage of government bonds, to offset the risks of junk bonds in the portfolio), the fact that Executive Life included no real estate mortgages or derivatives in its portfolio, and that Executive Life had a relatively low proportion of commercial real estate. White further explained that an investment in Executive Life posed no problem of an asset-liability "mismatch."

Id. at 86. There was ample record evidence, deemed credible by the district court, demonstrating that Unisys exercised the legally required degree of reasonable care in selecting Executive Life for inclusion in the Plan.

Equally important, and similarly obscured by petitioners, the district court found that the participants suffered no damages as a result of Unisys' actions. Viewing each

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did not undertake an analysis of the damages supposedly owing on this claim. *Id.* ("[P]laintiffs' expert admitted that he did no analysis of the damages claimed as a result of the alleged failure to diversify."). Plaintiffs' fiduciary breach claims for failure to disclose ran squarely into the same wholesale failure in proof. *Id.* at 139-40 ("[P]laintiffs did not submit any evidence of the damages supposedly caused by the claimed non-disclosures.").

investment contract in isolation, it is undisputed that the GICs returned all of their principal, with interest.[9] The district court specifically found, consistent with the plan documents, that the funds' "investment objective" was to "preserve the amount invested while earning interest income." *See* Pet. App. at 92. Because each of these investments returned all of the principal and paid interest to the participants, the district court properly found no damages.[10] Moreover, the district court, relying upon controlling Department of Labor regulations, examined a host of other factual considerations, namely that the relevant portfolios were purposefully structured to balance risk, and concluded that the fiduciaries were not imprudent in selecting Executive Life, and the participants suffered no damages. *See* Pet. App. at 142-44.[11] That conclusion was based, in part, on the

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9. Again, as the district court found, on undisputed facts:

> Each of the Executive Life contracts has returned all of the principal invested, with interest. Stated differently, contract # 1238 yielded a 5.56% return; contact # 1267 realized a 4.59% return; and contract # 1279 earned a 3.88% return.

See Pet. App. at 111.

10. Equally important, the district court made a number of critical findings on the glaring flaws in petitioners' damages expert's methodology. *See* Pet. App. 112-15. Plaintiffs' wholesale failure to offer any credible proof of damages underscores the futility of their cause.

11. More specifically, the prudence requirements of ERISA section 404(a) are "satisfied," according to the Department of Labor, if the fiduciary has given "appropriate consideration" to "the role the investment or investment course of action plays in that portion

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undisputed fact that the Unisys funds outperformed a number of appropriate benchmarks, even after accounting for the fact that the Executive Life GICs did not perform as anticipated. *See* Pet. App. at 112-13.

REASONS FOR DENYING THE WRIT

Neither of the bases offered warrant review by this Court. Petitioners' first contention, that the standard governing appellate review of mixed questions of law and fact needs clarification, ignores Supreme Court precedent, particularly *Salve Regina College v. Russell*, 499 U.S. 225 (1991), granting latitude to the circuit courts to mold their review to the circumstances peculiar to each dispute. The circuit court opinions petitioners cite, and the varying standards applied to such mixed questions, reflect only adherence to this Court's precedent, rather than a split in circuit authority. Moreover, this Court has specifically held that the fashioning of appropriate standards of appellate review depends upon considerations of judicial economy rather than the substantive law underpinning the claims at issue, as petitioners argue. Simply stated, application of *de novo*

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of the plan's investment portfolio with respect to which the fiduciary has investment duties." 29 C.F.R. § 2550.404a-1(b)(1)(i). *See also Laborers Nat'l Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999) ("Since 1979, investment managers have been held to the standard of prudence of the modern portfolio theory by the Secretary's regulations."). While petitioners note that the California Insurance Commissioner impressed a conservatorship upon Executive Life, they fail to point out that these proceedings only "temporarily froze" payments on the GICs, *see* Pet. App. at 75, and, at the end of the day, petitioners were returned all of their principal invested, with interest. *See supra* at 7.

review to all mixed questions of law and fact in ERISA disputes, as petitioners request, would impinge upon the district court's exclusive role as fact-finder and likely increase the workload of the circuit courts, without yielding any appreciable improvement in the reliability of the fact-finding process. Moreover, and equally important, given the overwhelming proof presented by Unisys at trial, the outcome of this dispute will not change regardless of the scope of review employed and, as such, the issue is only of academic interest.

The exclusion of petitioners' liability "expert" is reviewed only for an abuse of discretion, as this Court recently held in *Kumho Tire v. Carmichael*, 119 S. Ct. 1167 (1999). The district court found, and the record sufficiently demonstrates, that the witness *lied* during the *voir dire* qualification process. Consistent with this Court's precedent, delegating to the district court the sole authority to make such credibility decisions, particularly in bench trials, and the discretion to adopt criteria and procedures for determining the admissibility of expert testimony, the district court's ruling cannot be upset on appeal, as the Third Circuit properly held. The exclusion of a witness proven to be a liar cannot possibly constitute an abuse of discretion, and there is nothing compelling or important about this issue.

The petition should be denied.

I.

THIS COURT HAS FASHIONED CLEAR RULES PERMITTING THE APPELLATE COURTS LATITUDE TO ADOPT VARYING STANDARDS FOR REVIEW OF MIXED QUESTIONS OF LAW AND FACT

This Court has specifically held that an appellate court may vary the standard applied to mixed questions of law and fact, following a determination on whether the ruling under review is fact driven, or grounded in legal principles:

> [W]e have held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is "better positioned" than the appellate court is to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine.

Salve Regina College v. Russell, 499 U.S. 225, 233 (1991).[12] Appellate courts may fashion an appropriate standard for review

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12. Before quoting the same language from *Salve Regina* above, Justice Scalia recently observed that there are no hard and fast rules governing the standard of appellate review applied to mixed questions of law and fact:

> Merely labeling the issues "mixed questions," however, does not establish that they receive *de novo* review. While it is well settled that appellate courts "accep[t] findings of fact that are not 'clearly erroneous' but decid[e] questions of law *de novo*," *there is no rigid rule with respect to mixed questions*.

Ornelas v. United States, 116 S. Ct. 1657, 1664 (1996) (Scalia, J., dissenting) (quoting *Salve Regina*, 499 U.S. at 233) (emphasis added)

(Cont'd)

of such mixed questions based upon the particularized nature of the findings under review, and the circumstances unique to each dispute. In sum, the central premise of petitioners' argument, *i.e.*, that the standard governing appellate review of mixed questions needs clarification, runs counter to this Court's rulings expressly granting the circuit courts tremendous latitude in framing their standards for appellate review of such mixed questions.

Indeed, many of the same considerations animating the selection of an appropriate standard of review of factual findings and legal conclusions apply equally to the determination of the scope of review for mixed questions of law and fact:

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(citation omitted). Justice Scalia further explained that prior precedent teaches that deferential review of mixed questions of law and fact may be appropriate where the "expertise of the district court" is needed, and the "law-clarifying value in the appellate decision" is lacking. *Ornelas*, 116 S. Ct. at 1664. Judge Easterbrook has similarly summarized this Court's rulings in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Anderson v. Bessemer City*, 470 U.S. 564 (1985), and *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986), as "reiterating the message that appellate courts should use deferential review for fact-intensive disputes, including the application of legal rules to facts." *Mars Steel Corp. v. Continental Bank, N.A.*, 880 F.2d 928, 933 (7th Cir. 1988). Moreover:

> Fact-intensive disputes, those whose resolution is unlikely to establish rules of future conduct, are reviewed under a deferential standard because the role of appellate courts in establishing and articulating rules of law is not at stake.

Id.

> We recently observed, with regard to the problem of determining whether mixed questions of law and fact are to be treated as questions of law or of fact for purposes of appellate review, that *sometimes the decision "has turned on a determination that as a matter of sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."*

Pierce v. Underwood, 487 U.S. 552, 559-60 (1988) (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)) (emphasis added). *Pierce* further identified reasons precluding the establishment of a singular standard for appellate review of mixed questions of law and fact including, at times, "the sheer impracticability of formulating a rule of decision for the matter in issue." *Id.* at 561 (quoting Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L. Rev. 635, 662-63 (1971)).[13] Simply stated, the

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13. More specifically:

> Many questions that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow facts that utterly resist generalization — at least, for the time being.

Pierce, 487 U.S. at 561-62. There are additional factors animating the application of a deferential standard of review to such matters, including the trial court's familiarity with the dispute, based on the length of the trial. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 500 (1984) ("[T]he likelihood that the appellate court will rely on the [clearly erroneous] presumption tends to increase when trial judges have lived with the controversy for weeks or months instead of just a few hours.").

standard of appellate review applied to mixed questions of law and fact should be tailored to circumstances peculiar to each dispute. Hence, the varying approaches employed by the circuit courts reflect only the exercise of that discretion, not a circuit split, as next explained.

The First Circuit's opinion in *New England Mut. Life Ins. Co. v. Baig*, 166 F.3d 1 (1st Cir. 1999), cited by petitioners, adheres precisely to the distinction drawn in this Court's precedent:

> The existence of an ERISA plan is a mixed question of law and fact. "[T]he district court's interpretation of the word 'plan' as used in ERISA poses a question of law subject to de novo review." However, "the court's inquiry into the nature and the scope of the benefits actually at issue . . . demands factfinding, and is to that extent reviewable only for clear error."

Id. at 3 (citations omitted).

Read carefully, the Second Circuit's opinion in *Lopresti v. Terwilliger*, 126 F.3d 34 (2d Cir. 1997), also cited in the petition, further demonstrates the operation of this Court's principles at work. There, the court held that the finding that an entity is an ERISA "fiduciary" is a legal determination, reviewed *de novo*:

> A careful review of the Trustee's briefs reveals that actually he is not challenging the district court's factual findings, but instead he is attacking the legal conclusion which the court drew from those facts — that is that the Terwilligers are not

> fiduciaries within the meaning of section 1002(21)(A) of ERISA. Because the Trustee disputes the legal conclusion reached by the district court here, and not the factual findings which formed the basis for that conclusion, *de novo* review is appropriate.

Id. at 39.[14]

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14. Without belaboring the point, the other circuit opinions upon which petitioners rely similarly mold the governing standard of review depending upon the nature of the issue presented, consistent with this Court's precedent. As the Fifth Circuit explained:

> However, in most instances where we have freely reviewed purportedly mixed issues of fact and law, the facts were undisputed and the only real issue was what legal implication should be drawn from the facts. Where factual issues were in dispute, in contrast, we have at times been willing to employ the clearly erroneous rule.

Reich v. Lancaster, 55 F.3d 1034, 1044 (5th Cir. 1995). *See also Central States Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 85 F.3d 1282, 1288-89 (7th Cir. 1996) (findings surrounding alter ego of corporate entity responsible for multi-employer pension plan contributions followed district court's "hearing the testimony, reviewing the evidence, and evaluating the credibility of the witnesses," and, as such, Rule 52(a) clearly erroneous standard governs). The Ninth Circuit's opinion in *Deegan v. Continental Casualty Co.*, 167 F.3d 502 (9th Cir. 1999), relied upon the Tenth Circuit's rule in holding that the question whether a participant was "totally disabled" was fact driven, compelling the application of the deferential clearly erroneous standard:

> This precise issue confronted the Tenth Circuit in *Wilcott v. Matlack, Inc.*, 64 F.3d 1458, 1460-61 (10th

(Cont'd)

There is no split in circuit authority requiring the grant of the instant petition. Rather, the circuit courts have employed the authority granted to them to determine an appropriate standard of review, depending upon the circumstances of each appeal.

Moreover, the substantive basis for the claims reviewed on appeal, here ERISA, does not require a uniform standard of appellate review, as petitioners variously argue. Petitioners lobby for uniform application of a *de novo* standard of appellate review of mixed questions of law and fact in ERISA cases. *See* Pet. at 14. That argument fails to properly account for the varied circumstances of each appeal. In other words, whether an individual is in fact "disabled" or the "nature and the scope" of the benefits at issue are but two of the possibly infinite number of mixed questions of law and fact arising in ERISA disputes and depend largely upon factual findings, as described in the circuit courts' opinions in *Deegan*, *Wilcott* and *Baig*.

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> Cir. 1995). In *Wilcott*, the insurance carrier appealed a district court conclusion that an employee was "totally disabled" within the meaning of his ERISA policy. The carrier contended that the district court finding involved the construction of an ERISA plan, and as a result, was a legal conclusion subject to a de novo review by the court of appeals. The court disagreed, concluding that "[t]he dispositive issue is 'not really the interpretation of the [ERISA plan], but rather a question of fact: whether [plaintiff] was totally and permanently disabled from any kind of work.' "

Deegan, 167 F.3d at 508-09 (citation omitted).

To the extent that a particular mixed question is largely grounded in facts found by the district court, application of *de novo* review to those factual findings would serve little or no purpose, save to transform the circuit courts into triers of fact. *E.g.*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("*Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise.*") (emphasis added).[15] To accept petitioners' argument and impress such duties upon the circuit courts would, at least in ERISA cases, negate the need for trials in the district court or make those trials "ultimately useless." *Concrete Pipe Prods. of California Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 623 (1994).[16]

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15. Quoting *Mars Steel Corp.*, 880 F.2d at 936. Of course, petitioners' suggested standard for *de novo* review would, in certain instances, run afoul of this Court's admonition that "appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Anderson*, 470 U.S. at 573 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)).

16. There is nothing in the statutory language of ERISA requiring *de novo* review of all mixed questions of law and fact, and to adopt petitioners' suggested rule would require the application of such a standard to appeals of all claims grounded in remedial statutes, yielding the untoward consequences described above. In other words, this Court has specifically, and recently, held that the governing substantive law is irrelevant to the selection of an appropriate standard of appellate review:

> *[T]he reviewing attitude that a court of appeals takes toward a district court decision should depend upon "the respective institutional advantages of trial and appellate courts," not upon what standard of review will more likely produce a particular substantive result.*

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 948 (1995) (quoting *Salve Regina*, 449 U.S. at 231-33) (emphasis added).

Two additional points merit consideration. First, petitioners argue that the district court's verbatim adoption of Unisys' proposed findings of fact and conclusions of law warrants particular scrutiny of the Third Circuit's ruling. While the district court adopted Unisys' suggested findings of fact and conclusions of law, this fact, standing alone, is of absolutely no consequence, given that all of the district court's detailed findings are supported by the record. In other words, this Court's criticism of the practice stems from a concern that district courts will endorse findings having no basis in the record, as this Court's *Anderson* opinion reveals:

> We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record.
>
> . . .
>
> Nonetheless, our previous discussions of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.

Anderson, 470 U.S. at 572.[17] Because the findings of fact adopted by the district court were each supported by ample record evidence, the factual findings are properly considered

17. *See also United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964) ("Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence.").

to be the product of the district court and must be reviewed consistent with the clearly erroneous standard of Rule 52(a).

Lastly, petitioners contend that the Third Circuit impermissibly deferred to the district court on its legal conclusions, notwithstanding the appellate court's statement that it reviewed *de novo* the mixed findings of law and fact. *See* Pet. at 16 n.5. The fact that the Third Circuit largely agreed with the district court's legal conclusions speaks nothing of the thoroughness of the appellate scrutiny. It is highly likely, given the strength of Unisys' case in the district court and the compelling legal authority offered by Unisys, that the Third Circuit was simply not persuaded by petitioners' legal arguments, despite exacting review of the district court's conclusions.[18] In any event, petitioners' argument invites this Court to engage in the impenetrable exercise of measuring the zeal of the appellate courts' analysis, in the face of an express statement that *de novo* review was employed. *Cf. Salve Regina*, 499 U.S. at 236 ("We decline the invitation to assume that courts of appeals craft their opinions disingenuously.").[19]

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18. In that regard, the Third Circuit's refusal to disturb the district court's conclusion that Unisys' actions were prudent "[m]easured by any standard," simply reflects, once again, the overwhelming strength of Unisys' case presented at trial, rather than some failing on the part of the Court of Appeals.

19. In further support of their contention that the Third Circuit impermissibly applied a deferential standard of review to the district court's legal conclusions, the petitioners complain that the "court of appeals never addressed case law and regulations indicating that reliance upon ratings would be insufficient." *See* Pet. at 15. In so arguing, petitioners unwittingly demonstrate the futility of their position. At the trial, Unisys offered undisputed testimony that, at

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In sum, this Court has specifically held that the standard for appellate review of mixed questions of law and fact may properly vary depending upon the facts and circumstances of each case, and the differing standards applied by the circuits reflects the proper application of this Court's rulings.

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the time of the purchase of the Executive Life GICs, the standard insurance rating services were the only available tool for properly evaluating the investment portfolios of the GIC issuers. *See supra* at 3. This testimony was deemed credible by the district court and led the Third Circuit to similarly observe that Unisys' GIC consultant "and other professionals had a high confidence in the thoroughness of the ratings services, which led to their respective ratings." *See* Pet. App. at 11. Petitioners would like to see this Court, or perhaps the Third Circuit on remand, fashion a *per se* legal rule that reliance on the insurance ratings services for selection of 401(k) savings plan investments is a fiduciary breach, based upon readily distinguishable authority relating to the purchase of annuities following the termination of a traditional defined benefit pension plan. The factual record here precludes the construction of a singular rule of law, especially one grounded in such dubious authority. That is precisely the point made in this Court's opinion in *Pierce*, *i.e.*, that application of a more stringent standard of appellate review will not necessarily yield a wide reaching and useful appellate precedent, mindful that many such rules are fact-driven. As quoted above, some questions arising in litigation, like the fiduciary standard applied to the purchase of guaranteed investment contracts for inclusion for in a defined contribution pension plan, are peculiarly grounded in facts and, as such, do not lend themselves to proper resolution by adoption and application of broad legal principles. *Pierce* (quoted *supra* at 12 n.13). *See also Cooter*, 496 U.S. at 405 ("Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise.").

II.

PETITIONERS' EXPERT WITNESS ARGUMENT IS NOT WORTHY OF CERTIORARI

Petitioners' second argument — whether the district court properly excluded the "expert" testimony of George M. Gottheimer — raises none of the issues resolved in this court's opinions in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999). Rather, the lower court's rulings present only the mundane question of whether the district court abused its discretion in refusing to listen to the testimony of an individual shown to be lying during the *voir dire* qualification process. Because the district court's ruling was based upon a credibility assessment made at trial, this Court's ruling in *Anderson*, underscoring the tremendous deference owed the district court in such circumstances, supplies the governing rule of law, not *Daubert* and its progeny.

Petitioners offered the testimony of Mr. Gottheimer in support of their contention that Unisys' selection of Executive Life GICs was a fiduciary breach under ERISA section 404(a), 29 U.S.C. § 1104(a). The district court excluded the witness after cross-examination revealed that Gottheimer did not have experience in the relevant area and, much more importantly to the task at hand, refused the proffer because these damning admissions came only after the witness was confronted with his previous sworn testimony (following a claimed inability to recall answers to simple questions a supposed expert should know). More specifically, petitioners' proposed liability expert, during his *voir dire* examination, initially could not remember: (i) whether his

previous testimonial engagements involved life insurance matters or property casualty insurance matters; (ii) whether the consulting work he had previously done was for property casualty or life insurance companies and; (iii) that he had previously *admitted*, in sworn testimony, that "*there are fundamental differences between evaluating the solvency of a property and casualty insurer on the one hand [and] a life insurer on the other.*" *See* Pet. App. at 120-24. Not surprisingly, the Third Circuit characterized these admissions as "material to the purported expert's qualifications." *Id.* at 28.

Only when impeached with his prior testimony did Mr. Gottheimer begrudgingly admit that his experience as both an expert and consultant was almost exclusively in the property casualty field and, once again, that there are "fundamental differences" in evaluating the solvency of property casualty insurers as opposed to life insurance companies, like Executive Life. After listening to the testimony and considering the fact that these admissions were secured by impeachment with prior testimony (and the related possibility that the witness was, with his claimed failure to recall, trying to mislead the district court), that court refused to consider the substance of Mr. Gottheimer's testimony. In his findings of fact, the district court stated that he refused the testimony based on the witness' "evasiveness, if not his propensity to state falsehoods." *See* Pet. App. at 133.[20]

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20. The petitioners look to obscure the fact that Gottheimer's credibility problems were central to the lower courts' refusal to permit him to testify, arguing that Gottheimer's "sub-specialization within the field of insurance was not the type that the district court would have liked." *See* Pet. at 23. Petitioners misstate those rulings. Aside from whether Gottheimer's claimed expertise was adequate

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Petitioners' reliance upon the *Daubert* line of cases is misplaced. Justice Breyer, concurring in *Joiner*, summarized the central focus of that authority and, in so doing, pointed up the failings in petitioners' argument. *Daubert* "will sometimes ask judges to make subtle and sophisticated determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer." *Joiner*, 118 S. Ct. at 520 (Breyer, J., concurring). The instant petition, on the other hand, presents only the question whether the district court properly refused to listen to the opinion of a proffered expert, after determining that the witness sought to obscure from that court shortcomings in his consulting and testimonial experience. As next explained, there is nothing compelling or important about this issue, and the matter was correctly decided.

First, this Court's opinion in *Anderson*, variously cited by petitioners in support of their standard of review argument, holds that, where, as here, a finding of the district court is based upon the witness' credibility, that finding is practically unassailable on appeal:

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to the task then at hand, the more important issue for those courts was the witness' efforts to mislead the district court on his prior experience. As the Third Circuit observed:

> The District Court determined that Dr. Gottheimer could not be a credible witness based on admissions secured through the use of his prior sworn testimony. Because the District Court, as fact-finder, listened to the testimony and assessed the credibility of the witness, these findings are entitled to great deference by this Court.

See Pet. App. at 25 (citation omitted).

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

Anderson, 470 U.S. at 575.[21] Because the district court's decision to preclude Mr. Gottheimer was a credibility determination grounded squarely in the record, that determination cannot be upset by any reviewing court.

Implicitly conceding that the district court's decision to exclude Gottheimer is supported by the record, petitioners press on, arguing that the district court could have changed his mind after hearing the entirety of the evidence and, as

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21. Implicit in *Anderson* is the notion that the sterile record transmitted to the appellate courts in this dispute does not reflect that which is well-known to everyone present in the district court for Mr. Gottheimer's testimony. The responses to the relevant cross-examination memorialized in the district court transcript were punctuated by the witness' profuse sweating and excessive hand wringing. The district court, of course, is the exclusive arbiter of such indicia of credibility and the appellate courts are not free to substitute their judgment for the conclusions reached by the trier of fact based upon such considerations, as the above quoted language from *Anderson* dictates. *See also Maine v. Taylor*, 477 U.S. 131, 145 (1986) ("the considerations underlying Rule 52(a)" include "the importance of first hand observation"). This is perhaps the most critical error in Chief Judge Becker's concurring and dissenting opinion in *Unisys*, wherein he concludes that the errors in Gottheimer's testimony "involved at most minor inconsistences." *See* Pet. App. at 65. Consistent with *Anderson*, the *Unisys* majority property deferred to the trier of fact on the issue.

such, was required to consider Mr. Gottheimer's opinion. *See* Pet. at 27. In support of their argument, petitioners cite to the Devitt and Blackmar treatise, *Federal Jury Practice and Instructions*. *Id.* Culling together their authority, petitioners overlooked a time-honored maxim found in the same book — *falsus in uno falsus in omnibus*:

> If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

3 Edward J. Devitt, *et al.*, *Federal Jury Practice and Instructions*, § 73.04 (4th ed. 1987).[22] The district court's refusal to consider the opinion of an "expert" proven to be a liar cannot possibly constitute an abuse of discretion.[23]

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22. *See also National Labor Relations Board v. Pittsburgh S.S. Co.*, 337 U.S. 656, 659 (1949) ("[T]he testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next.").

23. The decision to exclude an expert is reviewable for an abuse of discretion and that standard does not change where, as here, the district court refused to consider the expert's opinion and that exclusion materially impacted upon a party's prospects in the litigation. *Joiner*, 118 S. Ct. at 517. Of course, "deference . . . is the hallmark of abuse of discretion review." *Id.* at 517. The Third Circuit applied this standard. *See* Pet. App. at 26-27 ("Even if we might have made a different determination regarding Dr. Gottheimer's credibility, we are not at liberty to impose our opinion on the district court.").

Assuming its relevance, this Court's opinion in *Kumho Tire* further buttresses the correctness of the lower courts' ruling. The opinion emphasized that the district court is afforded tremendous latitude in fashioning criteria and procedures for determining the admissibility of expert testimony. To the extent the *Daubert* suggested the need for the application of a rigid methodology to such questions, this Court clarified that ruling in *Kumho Tire*, holding that "much depends on the particular circumstances of the particular case at issue." *Kumho Tire*, 119 S. Ct. at 1175. Consistent with the Third Circuit's opinion in *Unisys*, holding that requiring the district court as fact finder to listen to the opinion of a witness shown to by lying would "waste judicial time" (*see* Pet. App. at 27-28), this Court in *Kumho Tire* held:

> [T]he Rules seek to avoid "unjustifiable expense and delay" as part of their search for "truth" and the "jus[t] determin[ation]" of proceedings. Thus, whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.

119 S. Ct. at 1176 (citations omitted). In other words, the district court "must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* at 1176.[24] The

24. *Kumho Tire* holds further that the district court must be given "the discretionary authority needed . . . to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted." 119 S. Ct. at 1176. It necessarily follows that the discretion afforded district court

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district court's refusal to hear Mr. Gottheimer's opinion is reviewed only for an abuse of discretion. Having refused the proffer on the basis of the witness' lack of credibility, that decision does not present any compelling issues requiring this Court's further review.

CONCLUSION

The issues petitioners raise are neither special nor important, and the decisional conflicts they describe are illusory. The petition should be denied.

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judges must allow the trier of fact in a bench trial to summarily conclude that an expert's testimony should be refused where, as here, startling inconsistencies in sworn testimony are revealed soon after the witness takes the stand.